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Filed
Jan. 3, 1956
ERNEST L. ALLEN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF SOUTH CAROLINA

Civil Action No. 5261

State of South Carolina ex relatione South Carolina Public Service Commission, Complainant,

versus

The United States of America, The Interstate Commerce Commission, and the Atlantic Coast Line Railroad Company as the representative of all the railroad companies affected by the report of the Interstate Commerce Commission dated June 20, 1955 and by its order dated September 19, 1955, Docket No. 31291, Defendants.

This cause coming on to be heard before the undersigned constituting a special District Court of three judges, convened in accordance with statute; and being heard upon the pleadings, the record made before the Interstate Commerce Commission and the briefs and arguments of counsel; and being submitted by all parties for final decree:

The Court finds the facts to be as set forth in the Report of the Interstate Commerce Commission, and being of opinion, for the reasons set forth in the written opinion filed herewith, that the plaintiffs are not entitled to the relief prayed and that the action should be dismissed:

Now therefore, it is ordered that the prayer of the complaint be denied and that the action be dismissed, and that the costs hereof be taxed against plaintiffs.

This the 31st day of December, 1955.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

.....

U. S. District Judge, Eastern and Western Districts of South Carolina.

ASHTON H. WILLIAMS,
U. S. District Judge, Eastern District of South Carolina.

On Application for Injunction.

Argued November 4, 1955. Decided.

Before Parker, Circuit Judge, and Timmerman and Williams, District Judges.

T. C. Callison, Attorney General of South Carolina, and Irvine F. Belser, General Counsel South Carolina Public Service Commission, for Complainant; R. B. Gwathmey, Douglas McKay, U. B. Ellis, Charles P. Reynolds, James A. Bistline, James B. McDonough, Jr., John H. Lumpkin and Frank G. Tompkins, Jr., for Defendant Railroad Companies; Stanley N. Barnes, Assistant Attorney General, N. Welch Morrisette, Jr., U. S. Attorney, James E. Kilday, Maurice A. Fitzgerald, Samuel R. Howell, Leo H. Pou, Robert W. Ginnane, for defendants United States and Interstate Commerce Commission.

Parker, Circuit Judge:

This is an action to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission entered under section 13(4) of the Interstate Commerce

Act, 49 U. S. C. A. 13(4),* granting an increase in the intrastate freight rates for hauling certain commodities on railroads in the State of South Carolina. A court of three judges has been constituted as required by statute, the case has been heard upon the record made before the Commission and the briefs and arguments of counsel and has been submitted for final decree. The contention of plaintiff is that the order of the Commission is not supported by substantial evidence on the whole record that the railroads will realize any substantial increase of revenue from the increase of rates allowed by the order.

The facts are that the State of South Carolina is crossed by the great railroads constituting the principal arteries of commerce in the southeastern section of the United States and most of the hauling by railroad within the state is done by these systems. There is not now and for many years has not been any distinction in the handling of freight in interstate and intrastate commerce, the bulk of both interstate and intrastate freight being handled in the same way and with the same instrumentalities. If there has been any difference, it is that the cost with respect to intrastate freight is greater. The Commission found specifically, and there is no question as to the correctness of the finding, that "the conditions incident to the intrastate transportation of freight in South Carolina are not more favorable than those incident to interstate transportation of

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* "1. Section 13(3) of the Interstate Commerce Act, 49 U. S. C. A., sec. 13(3), authorizes the Commission to conduct an investigation where state rates are brought in question before it upon petition of a carrier. Section 13(4), 49 U. S. C. A., sec. 13(4), is as follows:

"Sec. 13, par. (4) *Duty of Commission where State regulations result in discrimination.* Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or the maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

freight between points in South Carolina, on the one hand, and the adjoining states in Southern Territory, on the other."

It has long been the policy of the railroads to maintain intrastate rates in South Carolina and other southeastern states on the same level as interstate rates. During the period of advancing prices which have prevailed since the second world war, the railroads sought and obtained several general increases in interstate rates to meet their need for additional revenue caused by increased operating costs in providing the adequate and efficient railway transportation service required by the Federal Railway Transportation Act. These increased operating costs were incurred in the movement of intrastate as well as interstate traffic. To the extent that intrastate traffic fails to bear its fair share of the increased operating cost by providing additional revenue commensurate with that provided by interstate traffic, it places an undue burden on interstate commerce, and to relieve this burden a petition was filed with the Commission asking that the intrastate rates on certain commodities be raised to permit the same percentage increases allowed in interstate rates.* The Commission thereupon conducted an extended hearing and filed a lengthy report in which it reviewed the history of the rates affecting the commodities involved, as well as the evidence relating thereto and the contentions of the parties, and made the following findings, which are crucial to the decision in this case, *viz.*:

> "3. The present intrastate rates and charges in South Carolina on clay, cotton, in bales, Cottonseed, cottonseed meal, cottonseed hulls, cottonseed oil, limestone, ground or pulverized, used for agricultural purposes, logs, sand, gravel, crushed stone and related commodities, road building materials, and pulpwood, imposed by authority of the State of South Carolina and under investigation in this proceeding, are generally lower than the interstate rates and charges on the same commodities between South Carolina and points in adjoining States, and traffic thereunder fails

* The South Carolina Public Service Commission allowed the percentage increases on all intrastate traffic except on the commodities here involved.

to produce its fair share of the revenue required by the respondents to enable them, under honest, economical, and efficient management, to provide adequate and efficient transportation service, and thereby accomplish the purpose of the Interstate Commerce Act as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense; the burden thus cast upon interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be on the basis herein approved; and these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. The undue, unreasonable, and unjust discrimination against interstate commerce herein found to exist should be removed by applying to the South Carolina intrastate rates and charges, on the commodities described in finding 3, the same respective increases which are, and for the future may be, maintained by the respondents on like interstate traffic between points in South Carolina and points in adjoining States under our authorization in *Ex Parte* Nos. 162, 166, 168 and 175; provided, that no intrastate rate shall be increased to a level that exceeds the lowest level of the interstate rates on like traffic over the same line of railroad to, from, or through South Carolina.

"5. The establishment of increases in intrastate rates and charges as provided in finding 4, and of the increased rates there prescribed, will not result in unjust or unreasonable rates or charges, nor rates or charges that are unjust or unreasonable in relation to the interstate rates and charges, and will substantially increase the respondents' revenues."

The findings of the Commission are not attacked except with respect to the finding that the increased rates will substantially increase the revenue of the railroads. As to this, plaintiff relies upon testimony, largely the prophecy of in-

terested shippers, that the increased rates will result in the diversion of traffic to carriers by truck. There is abundant testimony, however, supporting the findings of the Commission. Traffic experts of the three great railway systems serving the state testified unequivocally that, while there might be some diversion of traffic, the net result of the increase of rates would be to substantially increase revenues; and this testimony was not given *ex cathedra* but was supported by traffic studies introduced in evidence including a special four weeks' study which showed the increase in revenues due to increase in interstate rates on these commodities and included a four weeks' study showing the movement of these commodities in intrastate commerce and how much the revenues therefrom would have been increased by application of the percentage increases allowed in interstate rates. Thus the witness Kane, Assistant General Freight Agent of the Seaboard Air Line Railway Company, testified:

"Q. What comments have you to make on Section H of your exhibit?

"A. The *Ex Parte* 162 increases became effective interstate on January 1, 1947, and the other *Ex Parte* increases became effective interstate in 1948, 1949 and 1952. Most of the states granted these increases with relatively few exceptions on intrastate traffic during these same years. In Section H, I have shown the tonnage of each of the excepted commodities transported by each of the four principal South Carolina railroads during each of the years 1947 to 1952, inclusive, and also the revenue which each of these railroads received from these commodities during each of these years.

"I have also shown the total tonnage of the excepted commodities and the total revenue received from these commodities by the four principal South Carolina railroads during the years 1947 to 1952, inclusive. The tonnage and revenue received in 1947 is shown as 100 opposite the word 'Index', and the tonnage and revenue in the subsequent years have been related to the tonnage and revenue received in 1947.

"It will be noted that while there has been some variation in tonnage and revenue from year to year,

the revenue received on each of the excepted commodities during the year 1952 was greater and in most instances materially greater than that received in 1947.

• • •

"On road aggregates in 1952 tonnage exceeded the 1947 tonnage by 75 per cent and the 1952 revenue exceeded the 1947 revenue by 77 per cent.

"On pulpwood the 1952 tonnage of the Atlantic Coast Line Railroad and Charleston & Western Carolina Railroad exceeded the 1947 tonnage by 47 per cent and the 1952 revenue of these two carriers exceeded their 1947 revenue by 117 per cent.

"In my opinion this exhibit proves that the *Ex Parte* increases have resulted in very substantial increases in the carriers' revenues.

"Q. State whether or not, in your opinion, the increases sought in the instant case, if required by this Commission, will result in an increase in the carriers' revenues?

"A. The traffic officials of the Seaboard have given very careful consideration to the effect of the increase here sought on the carrier's revenues, and they are convinced these increases, if granted, will result in a substantial increase in revenues. This conclusion, I think, is amply supported by the showing made in Section H of my Exhibit 3. This section of the exhibit makes it plain that such diversions of traffic as may be occasioned by the increased rates do not come anywhere near offsetting the increases in revenue derived therefrom."

The witness Middleton, General Freight Agent of the Atlantic Coast Line Railroad Company, testified:

"Q. Do you think that, if granted, the increases in rates sought in this proceeding will produce increased revenue?

"A. I do. The most convincing proof is, I think, to look at what has happened to our total traffic since the several *Ex Parte* increases have been added. Page D-1 of my exhibit shows the total number of cars and tons

handled by, and the freight revenues of Atlantic Coast Line for the years 1945 through 1952.

"World War II ended in 1945 and the first increase under *Ex Parte* 162 became effective in 1946. Using 1945 as a basis of 100, it will be observed that the percentage in cars and tons handled since shows a gradual but erratic increase. The revenues have, however, shown a much more consistent trend upward. While there was an increase in both the number of cars and tons handled in 1946, our revenues were slightly down. Had even the 6 per cent increase which became effective July 1, 1946, been in effect during the entire year there would have been an increase instead. Beginning in 1947 there has been a consistent trend upward in our revenues, except in 1949. This was a year of widespread strikes, particularly in the coal and steel industry. Even so our revenue was approximately 10 per cent over 1945, whereas we handled a lesser number of cars and less tons than in 1945. In 1952 our revenue was 57.6 per cent over 1945, while the number of cars handled had increased only 15.4 per cent and number of tons handled 38.7 per cent.

"No comparable figures are available for South Carolina intrastate traffic, but, in my opinion, the total system figures are more pertinent anyway. The system figures include the movement under interstate rates, which have been subjected to the full authorized increases and have, therefore, borne the full impact of competition from other transportation agencies to which any traffic could have been diverted account of increased freight rates.

"It is a fact that some diversion has taken place as the result of some of the *ex parte* increases. Where such diversion has warranted, adjustments in the rates have been made. Such general adjustments have also been given intrastate application, however, so that these situations have also been met on intrastate traffic. The sought rates are not higher than on interstate traffic. We do not feel that the sought increases will be self-defeating but are convinced that they will produce more and not less revenue."

The witness Dilli, Assistant Freight Traffic Manager of the Southern Railway Company, testified:

"No doubt the question will arise as to the effect upon rail carriers' revenues if this Commission should find that the rates under consideration in this proceeding be increased to the level sought. Exhibit No. 11 shows particular data and, in addition, in the last column of figures on the right side there is shown the increased revenue of Southern Railway Company following the several *Ex Parte* proceedings indicated by reference marks on the extreme left hand side of the exhibit. As will be noted, except for the year 1949, Southern Railway Company's revenue both as to interstate traffic and intrastate and interstate traffic combined has increased each successive year since 1947. As indicated by reference mark (a), the year 1949, during which we had a decrease in freight revenue, was affected by the 'black days' in the coal industry along with other strike conditions in other industries. The year 1949 was a bad business year for all types of industry.

"If the increases sought in this proceeding are authorized by the Interstate Commerce Commission our revenue will be increased.

"Now a word in respect to diversions to other forms of transportation should the increase be authorized. Speaking for the Southern Railway, and I am sure other railroads in Southern Territory carry out the same policy as we do, we are constantly alert to all existing and potential competition confronting us, and it is our continuing purpose to take every available step to hold traffic to our line so as to produce increased revenue, and we are capable of exercising our managerial discretion necessary to achieve that objective."

It is clear that the foregoing testimony, together with the exhibits evidencing traffic studies upon which the testimony is based, furnish ample support for the finding of the Commission which is assailed. In *United States v. Louisiana*, 290 U. S. 70, 80, which involved an order raising intrastate rates and the question as to whether the increased

rates would produce increased revenue, the Supreme Court sustained an order of the Commission based on such testimony in the absence of a formal finding. The court recognized the judgment of the railroad traffic experts as an important factor for consideration by the Commission, saying:

> "The objection that the finding of unjust discrimination by the intrastate rates against interstate commerce is unsupported by any finding that the increased rates would produce increased revenue is rested upon the statement, separated from its context in the Commission's report, 'we conclude that no positive finding in regard to the revenue outcome of the increases can be justified.' It is manifest that any finding of undue prejudice to interstate commerce, based upon the failure of prevailing intrastate rates to contribute their fair share to the support of a national transportation system, must necessarily rest upon a prediction that an increase of the intrastate rates will result in an increase of revenue, a prediction involving, especially since 1930, many elements of uncertainty. There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, **including estimates of experienced railroad traffic men**, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonably exercise of sound managerial judgment. This, we think, meets the requirements of the statute." (Emphasis supplied.)

Whether experience with interstate rates is a dependable guide in judging the effect of a corresponding increase in intrastate rates is a matter of expert judgment as to which the opinion of the railroad traffic experts is certainly substantial evidence of real value, as their railroads will bear the loss if the increase of rates which they propose results in a decrease of revenue. Certainly their opin-

ion is entitled to as much weight as prophecies of traffic loss by interested shippers who have everything to gain and nothing to lose by holding intrastate rates at the existing level. At all events, we cannot say that the evidence upon which the Commission acted, which consisted not only of the testimony of these experts but also of the traffic studies upon which it was based, was not substantial evidence. The matter involved is largely a matter of expert judgment; and the Commission is "a tribunal appointed by law and informed by experience" to deal with just such matters. When it has based its order on evidence which is unquestionably substantial, we have no power to substitute our judgment or the judgment of the state commission for its judgment on the facts. This is too well settled to admit of argument. The rule was thus laid down more than forty years ago in *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 547:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent. v. I. C. C.*, 206 U. S. 441 Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Directly in point is the case of *Florida v. United States*, 292 U. S. 1, 12, wherein the Supreme Court was dealing with the power of the Commission to raise intrastate rates to remove the same sort of discrimination against interstate commerce as is involved in the case before us. Chief

Justice Hughes laid down the rule here applicable in the following language:

> "The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by sec. 13(4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *Shreveport case,* 234 U. S. 342, 351, 354, 355; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co., supra.* The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States v. Louisville & Nashville R. Co.,* 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission."

See also *Mississippi Valley Barge Co. v. United States,* 292 U. S. 282, 286; *Swayne & Hoyt Ltd. v. United States,* 300 U. S. 297, 304. The rule as above stated with respect to sustaining the order if supported by substantial evidence is the rule of the Administrative Procedure Act. See *Universal Camera Corp. v. N. L. R. B.,* 340, U. S. 474; *N. L. R. B. v. Southland Mfg. Co,* 4 Cir. 202, F. (2d) 244.

The case of *Mississippi Public Service Corp. v. United States,* 124 F. Supp. 809, upon which plaintiff chiefly relies, was considered and quoted from by the Commission but was distinguished on the ground that in the present case there was substantial evidence to support the finding as to the increased rates producing increased revenue.

Another case upon which plaintiff places great reliance is *State of North Carolina v. United States,* 325 U. S. 507; but that case was distinguished from a case such as this by the Supreme Court in *King v. United States,* 344 U. S. 254 on the ground that the order there was based upon the mere disparity between intrastate and interstate rates and did not contain the essential findings which were made in the *King case* and have been made here.

Of course the estimates of the experts may prove to be erroneous and the increased rates may not produce increased revenue. If so, application will doubtless be made for another change in the rates and an appropriate order will be entered by the Commission;* but such a possibility would not warrant our setting aside an order which is unquestionably supported by substantial evidence on the whole record now before us.

For the reasons stated, the petition to set aside and enjoin the enforcement of the order of the Commission will be denied and the action will be dismissed.

Petition denied and action dismissed.

I concur.

JOHN J. PARKER,
U. S. Circuit Judge.

ASHTON H. WILLIAMS,
U. S. District Judge.

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* The railroads have already asked and been allowed to withdraw requests for percentage increases as to a few commodities as to which it has been demonstrated that raise in rates would result in loss of revenue.

Timmerman, District Judge:

I do not agree with the views of my able and distinguished colleagues in this case, as such views are expressed in the opinion of Chief Judge Parker.

There is for consideration and determination this simple question: Is the conclusion of the Interstate Commerce Commission, that revenues of the railroads will be substantially increased by allowing increased intrastate freight rates on certain commodities to be shipped wholly within the State of South Carolina, supported by substantial evidence? I think not.

Evidence, if it is to be regarded as substantial, must have substance. It cannot be classed as substantial if it is vague or uncertain, or is the product of guess or surmise, or is equivocal. The evidence upon which the Interstate Commerce Commission acted is not only equivocal in many respects, it is vague and uncertain. I find in the record no established facts from which there can be drawn legitimate inferences as to what proportion of the commodities affected by the increased rates will be diverted by reason thereof from the railroads to other type carriers having lower rates. I do know as a matter of mathematical certainty that if the railroads lose twenty-five percent of the affected commodities the rate on the remaining three-fourths will have to be promoted by one-third to leave the railroads' revenue the same as it was before. I also know that if the commodities handled are reduced by only one-fifth that the rate on the remaining four-fifths will have to be increased by one-fourth to equal the revenue obtained before the rate was changed; and so on.

If we go in the other direction and reduce the commodities by one-third the rate will have to be increased by one-half for the railroads' revenue to continue constant.

The substance of the testimony offered by the proponents of the proposed rate increases is that they guess or surmise that the increased rates will result in increased revenue. They have not established any facts from which it can be concluded that the railroads will suffer only a certain percentage of diversion by reason of the increased rates.

On the other hand, the shippers testified that in their opinion the increased rates would result in decreased revenue to the railroads. That testimony, like the other, is largely guess and surmise. I find nothing in the record which warrants giving the railroads' witnesses preferential consideration. Both groups of witnesses should be placed in the same bracket. They both advocate acceptance of their guesses, as it is natural that they would do. Each group is undoubtedly biased in favor of its own opinions. If there was nothing more in this case than merely finding out what the railroads wanted it would have been unnecessary to have a hearing. That could have been determined by writing a letter. To say that if the railroads' officials have guessed wrong their guess can be corrected is to beg the question, for it is also true that if the shippers' guess is wrong it too can be corrected. We do have one fact in common in this case. It is true: Both groups agree that the increased rates will cause diversion of traffic from the railroads to other type carriers having lower rates. The only difference between them is their generalizations as to how much diversion will be accomplished by the increased rates. Of course the railroads hope that the increased rates will bring them increased revenue. This hope undoubtedly prompted the opinion that they will. I see nothing else in the record to justify the opinion. The shippers frankly are in favor of cheaper freight rates, which is natural, and they indicate that they intend patronizing the carriers that afford them the cheaper rates. If so, what then becomes of the hope of the railroads for increased revenue? To repeat, I have found in the record no established fact or facts justifying the conclusion that the revenue of the railroads will be increased, or that the diversion of freight from the railroads to other type carriers will be inconsequential by reason of the increased freight rates. I, therefore, dissent.

FILED
APR 18 1956
JOHN B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 794

STATE OF SOUTH CAROLINA EX RELATIONE SOUTH CAROLINA PUBLIC SERVICE COMMISSION,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION OF DEFENDANT AND INTERVENING RAILROADS TO AFFIRM

JAMES B. MCDONOUGH, JR.,
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Washington, D. C.;
Attorneys for Defendant and Intervening Railroads, Appellees.

April 18, 1956.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 794

STATE OF SOUTH CAROLINA EX RELATIONE SOUTH CAROLINA PUBLIC SERVICE COMMISSION,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION OF DEFENDANT AND INTERVENING RAILROADS TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, the defendant and intervening railroads, appellees, move that the judgment of the District Court be affirmed on the ground that the questions raised by appellant are so unsubstantial as not to need further argument.

This is a direct appeal from a final judgment entered on January 3, 1956, by a specially-constituted three-judge

District Court, pursuant to 28 U. S. C. Sections 1336 and 2321 to 2325, dismissing the suit of appellant to set aside and enjoin an order of the Interstate Commerce Commission entered in a proceeding entitled "Docket No. 31291, *South Carolina Intrastate Freight Rates and Charges*", 296 I. C. C. 159. The case below is reported in 136 F. Supp. 897. Direct appeal to this Court is authorized by 28 U. S. C. Sections 1253 and 2101(b), Notice of Appeal was filed on January 31, 1956, and appellant's Jurisdictional Statement was received by these appellees on March 26, 1956.

The aforesaid order of the Interstate Commerce Commission was issued under the power conferred upon it by Sections 13(3)(4) and 15a(2) of the Interstate Commerce Act (49 U. S. C. Sections 13(3)(4) and 15a(2)). The Commission found that the South Carolina intrastate rates on certain commodities [1] resulted in unjust discrimination against interstate commerce, and its order required the railroads operating in that State to increase their rates on these commodities by the amounts by which their interstate rates on said commodities had been increased under authority granted by the Commission in Ex Parte No. 162, Ex Parte No. 166, Ex Parte No. 168 and Ex Parte No. 175.[2]

In the proceedings just mentioned, the Interstate Commerce Commission authorized the railroads to make gen-

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[1] The commodities involved and the extent to which the South Carolina Commission had refused to authorize the increases which had been applied to the interstate rates on said commodities to, from, and between points in South Carolina are stated in Appendix A to the Commission's report (296 I. C. C. 180).

[2] The title and citations of the proceedings we have mentioned by number are: Ex Parte No. 162, *Increased Railway Rates, Fares and Charges, 1946*, 266 I.C.C. 537; Ex Parte No. 166, *Increased Freight Rates, 1947*, 270 I.C.C. 403; Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I.C.C. 9; and Ex Parte No. 175, *Increased Freight Rates, 1951*, 284 I.C.C. 589, and 289 I.C.C. 395. In a report dated November 14, 1955, 297 I.C.C. 17, the Commission authorized the railroads to make the Ex Parte No. 175 increases permanent.

eral increases in their interstate freight rates and charges "for the purpose of providing the carriers with additional revenue needed to meet increased costs for equipment, materials, supplies, and wages required to maintain an adequate and efficient railway service contemplated by the national transportation policy and by section 15a(2) of the act" (296 I. C. C. 161). These increased expenses were incurred in intrastate as well as interstate transportation (296 I. C. C. 161, 178), and the Commission's reports authorizing increases in the interstate rates show that it contemplated that substantially the same increases would be made in the intrastate rates.[3] The South Carolina Public Service Commission authorized the railroads to increase their intrastate rates on some commodities but not on others, the excepted commodities being among those which move in large volume and produce the most intrastate revenue. The assailed order of the Interstate Commerce Commission simply required the intrastate rates on the excepted commodities to be increased to the extent the interstate rates thereon had been increased.[4]

The Questions Presented

Appellant contends (1) that the finding of the Interstate Commerce Commission, that the increases required in the intrastate rates on the commodities involved herein will increase the railroads' revenues, is not supported by substantial evidence and the District Court erred in failing so

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[3] *King v. United States*, 344 U.S. 254, 257-258; Ex Parte No. 162, 266 I.C.C. 537, 613; Ex Parte No. 166, 270 I.C.C. 403, 463; Ex Parte No. 168, 276 I.C.C. 9, 13, 113; Ex Parte No. 175, 289 I.C.C. 395, 396, 441.

[4] The Commission's order, dated September 19, 1955, does not require an increase in the rates on pulpwood to Georgetown, S. C. The proceeding has been reopened for further hearing with respect to said rates, and the further hearing is being had under modified procedure. Consequently, the testimony of Messrs. J. E. McCaffrey and J. P. Hearn, mentioned on pp. 13 and 14 of appellant's Jurisdictional Statement, is entitled to no consideration.

to find; and (2) that the decision of the District Court in the instant case is contrary to the decision in *Mississippi Public Service Commission* v. *United States,* 124 F. Supp. 809 (motion to affirm granted, 349 U. S. 908).

Before discussing these questions it is advisable to set forth the findings of the Interstate Commerce Commission, and refer briefly to decisions of this Court defining "substantial evidence" and the scope of judicial review in cases involving orders of administrative agencies.

The Findings of the Commission

The findings of the Commission appear on pages 179-180 of its report and are as follows:

> "We find and conclude that—
>
> "1. The conditions incident to the intrastate transportation of freight in South Carolina are not more favorable than those incident to the interstate transportation of freight between points in South Carolina, on the one hand, and the adjoining States in southern territory, on the other.
>
> "2. The amounts and percentages by which interstate freight rates and charges between points in South Carolina and points in other Sates were increased, as authorized in Ex Parte Nos. 162, 166, 168, and 175, were and are just and reasonable.
>
> "3. The present intrastate rates and charges in South Carolina on clay, cotton, in bales, cottonseed, cottonseed meal, cottonseed hulls, cottonseed oil, limestone, ground or pulverized, used for agricultural purposes, logs, sand, gravel, crushed stone and related commodities, road-building materials, and pulpwood, imposed by authority of the State of South Carolina and under investigation in this proceeding, are generally lower than the interstate rates and charges on the same com-

modities between South Carolina and points in adjoining States, and traffic thereunder fails to produce its fair share of the revenue required by the respondents to enable them, under honest, economical, and efficient management, to provide adequate and efficient transportation service, and thereby accomplish the purpose of the Interstate Commerce Act as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense; the burden thus cast upon interstate commerce is undue in and to the extent that these intrastate rates and charges are less than they would be on the basis herein approved, and these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4 The undue, unreasonable, and unjust discrimination against interstate commerce herein found to exist should be removed by applying to the South Carolina intrastate rates and charges, on the commodities described in finding 3, the same respective increases which are, and for the future may be, maintained by the respondents on like interstate traffic between points in South Carolina and points in adjoining States under our authorizations in Ex Parte Nos. 162, 166, 168, and 175; provided, that no intrastate rate shall be increased to a level that exceeds the lowest level of the interstate rates on like traffic over the same line of railroad to, from, or through South Carolina.

"5. The establishment of increases in intrastate rates and charges as provided in finding 4, and of the increased rates there prescribed will not result in unjust or unreasonable rates or charges, nor rates or charges

that are unjust or unreasonable in relation to the interstate rates and charges, and will substantially increase the respondents' revenues.

"The foregoing findings and conclusions are without prejudice to the right of the authorities of the State of South Carolina, or any other interested party, to apply for modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act."

The above findings, if supported by substantial evidence, are adequate to sustain the Commission's order, and there is no contention that they are inadequate. *King* v. *United States,* 344 U.S. 254.

What Constitutes Substantial Evidence in Cases Involving the Review of Orders of Administrative Agencies, and the Weight to Be Accorded Findings Supported by Such Evidence.

In *Consolidated Edison Co.* v. *N.L.R.B.,* 305 U.S. 197, 229, Mr. Chief Justice Hughes stated:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[5]

In *United States* v. *Louisiana,* 290 U.S. 70, which involved an order of the Interstate Commerce Commission raising intrastate rates and the question whether the increased rates would produce increased revenue, this Court sustained the order, on basis of the testimony of railroad

[5] See also *N.L.R.B.* v. *Southland Mfg. Co.,* 201 F. 2d 244, 246 (opinion by Judge Parker).

officials, in the absence of a formal finding by the Commission. In an opinion by Mr. Justice Stone, the Court stated (p. 80):

> "The objection that the finding of unjust discrimination by the intrastate rates against interstate commerce is unsupported by any finding that the increased rates would produce increased revenue is rested upon the statement, separated from its context in the Commission's report, 'we conclude that no positive finding in regard to the revenue outcome of the increases can be justified.' It is manifest that any finding of undue prejudice to interstate commerce, based upon the failure of prevailing intrastate rates to contribute their fair share to the support of a national transportation system, must necessarily rest upon a prediction that an increase of the intrastate rates will result in an increase of revenue, a prediction involving, especially since 1930, many elements of uncertainty. There are no formal requirements for the findings to be made by the Commission in this type of case, see Manufacturers Ry Co. v. United States, 246 U.S. 457, 490, 38 S. Ct. 383, 62 L. Ed. 831, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, *including estimates of experienced railroad traffic men*, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute." (Italics supplied.)

Section 10(e) of the Administrative Procedure Act (5 U.S.C. Section 1009(e)) provides that in determining whether or not the order of an administrative agency is

supported by substantial evidence, the Court shall review "the whole record." This means, as stated in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488, that:

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

But "the requirement for canvassing 'the whole record' in order to ascertain substantiality" was not intended to negative the function of the Commission

> "as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." (340 U.S. 488.)

It has long been settled that the question of the weight of the evidence is for the Commission and not for the court, and that:

> " * * * The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. United States v. Louisville & Nashville R. Co., 235 U.S. 314, 320, 35 S. Ct. 113, 59 L. Ed. 245. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due

> hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission." *Florida* v. *United States*, 292 U.S. 1, 12.

The statement last quoted was made by Mr. Chief Justice Hughes in a case, like the instant case, which involved the validity of an order of the Interstate Commerce Commission, under Section 13(4) of the Interstate Commerce Act, requiring an increase in intrastate rates in order to remove unjust discrimination against interstate commerce.

The necessity for considering the record as a whole to determine substantiality has not changed the rule that findings of administrative agencies supported by substantial evidence must be accepted by the courts. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508; *Voris* v. *Eikel*, 346 U.S. 328, 333-334.

The District Court Followed the Correct Principles of Law in Upholding the Commission's Order

The opinion of the District Court was written by Honorable John J. Parker, Chief Judge of the Circuit Court of Appeals for the Fourth Circuit. The learned judge stated (136 F. Supp. 899-900):

> "The findings of the Commission are not attacked except with respect to the finding that the increased rates will substantially increase the revenue of the railroads. As to this, plaintiff relies upon testimony, largely the prophecy of interested shippers, that the increased rates will result in the diversion of traffic to carriers by truck. There is abundant testimony, however, supporting the findings of the Commission. Traffic experts of the three great railway systems serv-

ing the state testified unequivocally that, while there might be some diversion of traffic, the net result of the increase of rates would be to substantially increase revenues; and this testimony was not given *ex cathedra* but was supported by traffic studies introduced in evidence including a special four weeks' study which showed the increase in revenues due to increase in interstate rates on these commodities and included a four weeks' study showing the movement of these commodities in intrastate commerce and how much the revenues therefrom would have been increased by application of the percentage increases allowed in interstate rates."

Then, after reviewing the evidence and quoting from this Court's opinion in *United States* v. *Louisiana, supra,* he continued (136 F. Supp. 902-903):

"Whether experience with interstate rates is a dependable guide in judging the effect of a corresponding increase in intrastate rates is a matter of expert judgment as to which the opinion of the railroad traffic experts is certainly substantial evidence of real value, as their railroads will bear the loss if the increase of rates which they propose results in a decrease of revenue. Certainly their opinion is entitled to as much weight as prophecies of traffic loss by interested shippers who have everything to gain and nothing to lose by holding intrastate rates at the existing level. At all events, we cannot say that the evidence upon which the Commission acted, which consisted not only of the testimony of these experts but also of the traffic studies upon which it was based, was not substantial evidence. The matter involved is largely a matter of expert judgment; and the Commission is 'a tribunal appointed by law and informed by experience' to deal with just such matters. When it has based its order on evidence which

is unquestionably substantial, we have no power to substitute our judgment or the judgment of the state commission for its judgment on the facts. This is too well settled to admit of argument."

Judge Parker next quoted from this Court's opinions in *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547, and *State of Florida* v. *United States*, 292 U. S. 1, 12, and stated (136 F. Supp. 903-904):

"* * * The rule as above stated with respect to sustaining the order if supported by substantial evidence is the rule of the Administrative Procedure Act, 5 U. S. C. A. Section 1001 et seq. See Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456; N. L. R. B. v. Southland Mfg. Co., 4 Cir., 201 F. 2d 244."

The Motion to Affirm Should Be Granted for the Following Reasons

1. *The Only Question Presented to the Court Is a Question of Fact, and This Is Not the Place to Review Conflicts of Evidence in Cases Like the Instant Case*

We have shown that the District Court applied the correct principles of law in deciding the instant case. This being so, the only question remaining is one of fact, *i. e.*, is the Commission's finding, that the railroads will receive increased revenue from the increased rates, supported by substantial evidence on the record as a whole. Appellant is asking this Court to review the entire record consisting of 889 pages of testimony and 51 exhibits to determine this question of fact. But in *N. L. R. B.* v. *Pittsburgh S. S. Co.*, 340 U. S. 489-503, the Court stated:

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather

than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U. S. 543, 544."

See also *Universal Camera Corporation* v. *N. L. R. B., supra*, at pages 490-491, and *N. L. R. B.* v. *American Insurance Co.*, 343 U. S. 395, 401-410.

2. *An Examination of the Opinion of the District Court Makes it Apparent That the Commission's Finding Is Supported by Substantial Evidence on the Record as a Whole*

After this case was argued before the District Court, that court gave the parties the privilege of filing supplemental briefs on the sole question whether the finding of the Commission, that the increases required in the intrastate rates on the involved commodities would increase the railroads' revenues, was supported by substantial evidence. Such briefs were filed. The opinion of the court shows that it gave careful consideration to this evidence, much of which is quoted or summarized in its opinion. After quoting and summarizing the evidence, the court stated (136 F. Supp. 902):

"It is clear that the foregoing testimony, together with the exhibits evidencing traffic studies upon which

the testimony is based, furnish ample support for the finding of the Commission which is assailed."

In view of the fact that the evidence is summarized in the opinion of the District Court, as well as in the report of the Commission, we shall not undertake to discuss it here. We do call attention to certain statements in the court's opinion and to findings of the Commission which lend added weight to the conclusion that the increased rates will increase the railroads' revenues:

(a) "* * * The Commision found specifically, and there is no question as to the correctness of the finding, that 'the conditions incident to the intrastate transportation of freight in South Carolina are not more favorable than those incident to interstate transportation of freight between points in South Carolina, on the one hand, and the adjoining states in Southern Territory, on the other.' " (136 F. Supp. 898, and I. C. C. Finding 1.)

(b) "The establishment of increases in intrastate rates and charges as provided in finding 4, and of the increased rates there prescribed will not result in unjust or unreasonable rates or charges, nor rates or charges that are unjust or unreasonable in relation to the interstate rates and charges * * *." (I. C. C. Finding 5.)

(c) "It has long been respondents' [the railroads'] policy to maintain rates intrastate in South Carolina and other southern States on the same level as the interstate rates." (296 I. C. C. 177-178.)

(d) "* * * Competition of the several transportation agencies, rail, truck, and barge, is not confined to intrastate traffic but obtains also in the movement of interstate traffic." (296 I. C. C. 178.)

There Is No Conflict Between the Decision of the District Court in This Case and the Decision in Mississippi Public Service Commission v. United States, 124 F. Supp. 809.

Appellant relies principally upon an alleged conflict between the decision of the District Court in the instant case and the decision in *Mississippi Public Service Commission* v. *United States,* 124 F. Supp. 809, as justifying an extensive consideration by this Court of the question whether the Commission's finding is supported by substantial evidence. But there is no real conflict between the two decisions—certainly none of sufficient general importance to warrant this Court's burdening itself with a consideration of the lengthy record involved.

Where decisions depend on questions of fact, they will vary according to the evidence submitted in each case. A holding in one case that the Commission's finding is supported by substantial evidence, and a holding in another that its finding is not so supported, do not create a conflict of decision, particularly where the proper standard for determining the substantiality of the evidence has been followed. In *Universal Camera Corp.* v. *N.L.R.B., supra,* it was stated (p. 491) that:

> "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or *grossly* misapplied." (Italics supplied.)

The *Mississippi case* and *Louisiana Public Service Commission* v. *United States,* 125 F. Supp. 180, involved orders of the Interstate Commerce Commission, under Section 13(4) of the Interstate Commerce Act, requiring certain intrastate rates in both states to be increased by the amounts of general increases authorized and applied to the interstate rates to, from, and between points in those states. In each case the Commission made substantially the same

findings, and its orders required the intrastate rates on many of the same commodities to be increased by the same amounts in each of these adjoining states. In one case the District Court held that the Commission's findings were not supported by substantial evidence and its order should be enjoined. But in the other, another District Court held that the Commission's findings were supported by substantial evidence and its orders should not be enjoined. This Court granted motions to affirm in both cases.[6]

It is plain, therefore, that the Court does not regard different decisions of district courts with respect to questions of fact as creating a conflict of decision which it should resolve.

The Interstate Commerce Commission and the court below considered the decision in the *Mississippi case* (296 I.C.C. 178, 136 F. Supp. 904). Both distinguish the instant case from the *Mississippi case* on the ground that here the evidence supporting the Commission's finding is substantial. This conclusion is not only correct, but the question of its correctness is of insufficient general importance to justify an examination of a lengthy record by this Court. See *Federal Trade Commission* v. *American Tobacco Co.*, 274 U.S. 543.

Other Contentions of Appellant Are Without Substance

Appellant seeks to make much of the fact that the railroads withdrew their request for increases in the rates on cement and cotton. The request for increases in the rates on these commodities was withdrawn because the railroads reduced the rates on said commodities and established the reduced rates for application both interstate and intrastate within the South, including South Carolina (296 I.C.C. 160, 161).

A reduction in the rates on two commodities does not show that increased rates on the remaining commodities

[6] The motions to affirm were granted in 348 U.S. 885 and 349 U.S. 908.

will not increase railroad revenues, and neither does it detract from the weight to be accorded the Commission's finding. What is does show is that the railroads are alive to the competition with which they are faced and are not asking for increases which will cause the loss of traffic. Viewed in this light, the reductions add strength to the Commission's finding that increases in the rates on the involved commodities will produce increased revenue.

It may be added that both the Commission and the railroads realized that the latter could not take advantage of the full amounts of the increases authorized in the rates on all commodities in Ex Parte Nos. 162, 166, 168, and 175, and that some revision of the rates on particular commodities might be necessary from time to time. *Increased Freight Rates, 1948,* 276 I. C. C. 9, 112. The railroads were expected to revise, and have revised, their state and interstate rates when necessary to prevent the diversion of traffic. Such revisions were made after the Commission's order, under Section 13(4) of the Interstate Commerce Act, requiring increases in the Florida intrastate freight rates, but the order order was upheld by this Court. *King* v. *United States, supra,* at page 272.

Appellant also emphasizes the fact that neither the Commission nor the railroads undertook to state the amount by which the railroads' revenues would be increased by the increased rates. But, as pointed out in *United States* v. *Louisiana, supra,* the effect of an increase in rates upon railroad revenues "must necessarily rest upon a prediction." (290 U. S. 80.) In that case the Court upheld an order of the Commission requiring an increase in intrastate rates, although the Commission's report contained the statement that "we conclude that no positive finding in regard to the revenue outcome of the increases can be justified." (*Ibid.*). It is, therefore, obvious that no state-

ment in dollars of the amount of the increased revenue is necessary.

In the instant case the railroads conducted a traffic study and showed in dollars the increase in revenue which would be produced by the increased rates if said rates were applied to the traffic that moved during the period the study was made. (296 I. C. C. 162.) Experienced traffic officials testified that the increased rates would result in a substantial increase in revenues, and that such diversions as might occur would not "come anywhere near offsetting the increases in revenue derived therefrom." (136 F. Supp. 900, 902.) This evidence was sufficient.

For the foregoing reasons, it is manifest that this appeal presents no new or substantial questions of law and that the only question presented is one of fact. The Commission's finding of fact is supported by substantial evidence, as the District Court held. These appellees, therefore, urge that this Court grant the motion to affirm the judgment of the District Court.

Respectfully submitted,

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April 18, 1956.

CERTIFICATE OF SERVICE

I, Charles P. Reynolds, one of the attorneys for the railroad appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of April, 1956, I served copies of the foregoing Motion to Affirm on the several parties thereto as follows:

1. On the State of South Carolina, in duly addressed envelopes, with first-class postage prepaid, to its respective attorneys as follows:

T. C. Callison, Attorney General,
Columbia, S. C.
Irvine F. Belser, General Counsel for the South Carolina Public Service Commission,
306 Barringer Building,
Columbia, S. C.

2. On the United States of America, by mailing a copy in duly addressed envelopes, first-class postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., to Stanley N. Barnes, Esq., Assistant Attorney General, and Maurice A. Fitzgerald, Esq., Department of Justice, Washington 25, D. C., and by mailing a copy to N. Welsh Morrisette, Jr., Esq., United States Attorney for the Eastern District of South Carolina, Columbia, S. C.

3. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, first-class postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and to Samuel R. Howell, Esq., its Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

(Signed) CHARLES P. REYNOLDS,
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 794

STATE OF SOUTH CAROLINA EX REL. SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment (dated December 31, 1955, and filed January 3, 1956) of a three-judge district court convened pursuant to 28 U.S.C. 2284, 2325, dismissing a complaint seeking to set aside an order of the

Interstate Commerce Commission. The order of the Commission required appellee rail carriers to increase their intrastate rates in South Carolina on certain commodities to the level of the interstate rates applicable to such commodities.

After the Commission had ordered a general increase in interstate freight rates, the railroads operating in South Carolina requested the South Carolina Public Service Commission to grant similar increases in intrastate rates. The South Carolina Commission allowed the increases except on certain specified commodities. The railroads then petitioned the Interstate Commerce Commission to increase the intrastate rates on the excepted commodities. After full administrative proceedings, the Commission found that the conditions incident to the intrastate transportation of freight in South Carolina were not more favorable than those incident to the interstate transportation of freight between points in South Carolina, on the one hand, and points in adjoining States, on the other; that the percentages by which the interstate rates had been increased were just and reasonable; that the existing intrastate rates on the excepted commodities were generally lower than the interstate rates on the same commodities between points in South Carolina and points in adjoining States; that traffic under the intrastate rates failed to produce its fair share of the revenue required by the railroads to enable them to provide adequate and efficient service; that the intrastate rates were unjustly discriminatory as against

interstate commerce; that the discrimination should be removed by applying to the intrastate rates the same percentage increases as had been applied to the interstate rates; and that thus increasing the intrastate rates would not result in unjust or unreasonable rates, and would substantially increase the carriers' revenues. *South Carolina Intrastate Freight Rates and Charges,* 296 I.C.C. 159, 179-180.

The Commission thereupon ordered the railroads to increase the intrastate rates to the level at which it previously had fixed the interstate rates.

On review, the district court (one judge dissenting) sustained the Commission's order. Noting that the findings made by the Commission were not challenged as to adequacy, and that only one[1] of them as to the sufficiency of the evidence to support it, the court (*per* Circuit Judge Parker) held, upon its review of the "whole record", that the evidence furnished "ample support" for the assailed finding.

ARGUMENT

1. Section 13 (4) of the Interstate Commerce Act authorizes the Commission to prescribe new intrastate rates if it finds that existing intrastate rates cause (1) unjust discrimination against interstate commerce, or (2) undue preference or prejudice against persons or localities in interstate commerce. In *King* v. *United States,* 344 U.S. 254, this Court held (pp. 270-271) that a

[1] The finding that the increase in intrastate rates would result in a substantial increase in the carriers' revenues.

Commission order designed to remove unjust discrimination against interstate commerce, which increased Florida intrastate rates to the interstate rate level, was supported by findings substantially the same as the findings made by the Commission in the instant case.

Appellants do not challenge the adequacy of the findings to sustain the order. Their principal contention (Jurisdictional Statement, 10, 24-30) is that there is inadequate evidentiary support for the finding that the increases ordered in the intrastate rates will produce a substantial increase in the revenues of the appellee railroads. This issue was fully briefed and argued before the lower court which, after careful consideration, concluded that this finding had "ample support" in the testimony and documentary evidence, and that the Commission's order was "unquestionably supported by substantial evidence on the whole record now before us." We submit that the correctness of this conclusion is manifest, and that the case presents no question of general importance or substance warranting further review by this Court.

The district court pointed out that the record contains "abundant testimony" supporting the challenged finding. "Traffic experts of the three great railway systems serving the state testified unequivocally that, while there might be some diversion of traffic, the net result of the increase of rates would be to substantially increase revenues; and this testimony was not given *ex cathedra* but was supported by traffic studies introduced in evi-

dence including a special four weeks' study which showed the increase in revenues due to increase in interstate rates on these commodities and included a four weeks' study showing the movement of these commodities in intrastate commerce and how much the revenues therefrom would have been increased by application of the percentage increases allowed in interstate rates" (136 F. Supp. at 900). The district court's holding that the testimony of the railroad traffic experts, supported by the described traffic studies, constituted substantial evidence to support the Commission's finding that the higher intrastate rates would increase the carriers' revenues is supported by the decision of this Court in *United States* v. *Louisiana*, 290 U.S. 70, 80.

In substance, appellants contend that the district court should have weighed, and that this Court should now weigh, the evidence *pro* and *con* the question whether the increase in intrastate rates will substantially increase the carriers' revenues. But, as the district court correctly held, it is well settled that when the Commission "has based its order on evidence which is unquestionably substantial, we have no power to substitute our judgment or the judgment of the state commission for its judgment on the facts." (136 F. Supp. at 903).

The underlying evidence is fully summarized both in the Commission's report and in the opinion of the court below (Juris. Statement, pp. 40-43), and we shall not repeat it here. This Court has

indicated that the initial reviewing court has "primary responsibility" (*National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U.S. 498, 502) for determining "whether on the record as a whole there is substantial evidence to support agency findings", and that this Court will re-examine the record only in the "rare instance" where the reviewing court has "misapprehended or grossly misapplied" the governing criteria. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 491. There appear to be no special circumstances in the instant case which would warrant a recanvassing of the lengthy Commission record by a second reviewing court. See *New England Divisions Case*, 261 U.S. 184, 203-204; *Radio Corp.* v. *United States*, 341 U.S. 412, 415. The fact that there may be evidence in the record from which another trier of the facts might have reached a conclusion contrary to that of the Commission affords no basis for overturning the Commission's order. See *United States* v. *Detroit & Cleveland N. Co.*, 326 U.S. 236, 241; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 536.

2. Appellants also contend (Jurisdictional Statement, 8, 24) that there is a "direct conflict" between the judgment of the district court in this case and the decision of the district court in *Mississippi Public Service Comm.* v. *United States*, 124 F. Supp. 809 (S. D. Miss.), *affirmed per curiam*, 349 U.S. 908. We submit there is no such conflict, for the facts and the evidence were not the same in the two cases. In *Mississippi*, the district court

found upon review that the evidence in the record, considered as a whole, was insufficient to sustain the Commission's finding that the rate increases ordered would produce substantial additional revenue for the carriers there involved. The court in the instant case found that the Commission had correctly distinguished the *Mississippi* case "on the ground that in the present case there was substantial evidence to support the finding as to the increased rates producing increased revenue" (136 F. Supp at 904).

There is no more logic in appellants' contention in this respect than there would be in an argument that the *Mississippi* case (affirmed by this Court in April 1955) is in conflict with *Louisiana Public Service Comm.* v. *United States,* 125 F. Supp. 180 (E. D. La.), *affirmed per curiam* (November 1954), 348 U.S. 885. The two cases involved similar rate increases, on virtually the same commodities, and on somewhat similar evidence. In the former, however, the district court held that the finding that the increased intrastate rates would increase total revenues was *not* supported by substantial evidence; in the *Louisiana* case, the district court held there *was* substantial evidence to support that finding. This Court affirmed both judgments. The *Mississippi* decision, therefore, is no more a controlling precedent in the instant case than is the *Louisiana* decision, or, for that matter, the more recent decision in *North Carolina* v. *United States,* 128 F. Supp. 718 (E.D. N.C.), *affirmed per curiam* (October 1955), 350 U.S. 805, which upheld an order raising intrastate rates.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 794

STATE OF SOUTH CAROLINA EX RELATIONE S. C. PUBLIC SERVICE COMMISSION, APPELLANT,

versus

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

INTRODUCTORY STATEMENT

The undersigned counsel for the appellant in the above entitled case have been served with a Motion to Affirm by defendant railroads and also with a Motion to Affirm by counsel for the United States and for the Interstate Commerce Commission, the latter Motion being received on April 25, 1956.

In accordance with the rules of the Supreme Court, we hereby submit on behalf of appellant our Brief in Opposition to the Motion to Affirm:

I

I. Appellees Make No Argument as to Sufficiency of Evidence.

The most striking thing about the Motions to Affirm filed by the appellees is their total failure to meet, or even to attempt to meet, the burden of proof cast upon them by the authorities in cases of this sort.

It is clearly established by the authorities, that in order to justify the Interstate Commerce Commission in setting aside state-made freight rates the justification therefor must clearly appear and the evidence must meet a high standard of certainty.

> "A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty'. *Illinois C. R. Co. v. State Pub. Utilities Commission*, 245 U. S. 493, 510, 62 L. ed. 425, 438, 38 S. Ct. 170 P. U. R. 1918C 1279. Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appeal'. *Florida v. United States*, 282 U. S. 194, 211, 212, 75 L. ed. 291, 301, 302, 51 S. Ct. 119. See also *Yonkers v. United States*, 320 U. S. 685, 88 L. ed. 400, 64 S. Ct. 327 * * *."
>
> *North Carolina v. United States*, 325 U. S. 507, 89 L. Ed. 1760.

"The true rule is that, whenever the Commission attempts to exert the power to interfere with intrastate rates which are otherwise in the dominion of state regulation, the justification for the exercise of such power by the Commission must clearly appear of record."

Mississippi Public Service Commission v. The United States of America, 124 Fed. Sup. 809, affirmed by U. S. Supreme Court, April 18, 1955 (99 L. Ed. 502).

Appellees in their argument have not even undertaken to question the principle established by the foregoing authorities nor to cite any authority to the contrary.

Nor have the appellees undertaken to question or criticize any of the evidence set forth in the Jurisdictional Statement showing the unsubstantiality of the evidence upon which the order of the Interstate Commerce Commission purports to be based. They have not cited any additional evidence other than that contained in our jurisdictional statement, nor have they undertaken to give any logical reasons to support their claim that such evidence amounts to "substantial" evidence.

They have contented themselves with arguing principally that this Court should not review the findings of the Interstate Commerce Commission holding the evidence substantial. They have based their arguments principally upon what we conceive to be a misconstruction and misinterpretation of the *United States v. Louisiana case,* 290 U. S. 70, 78 L. Ed. 181, and *Universal Camera Corporation case,* 340 U. S. 474, 95 L. Ed. 456.

Appellees in their Motions to Affirm seek to make much of the various findings by the Interstate Commerce Commission. It is obvious, however, that if the evidence fails to show that the increased rates would produce an increase in revenue for the carriers, all the other findings of the Commission are in fact irrelevant.

The principal questions would therefore seem to be:

1. Is the evidence of results in interstate operations, together with opinions based thereon, sufficient to constitute substantial evidence of the results to be expected in

intrastate operations, and of the high standard of certainty required for orders of the Interstate Commerce Commission interfering with state-made freight rates?

2. Did not the Court below misapprehend the proper standard in basing its conclusion wholly on the opinion of traffic experts and interstate operations and in disregarding the contrary evidence of the shippers and the findings of the South Carolina Public Service Commission?

II. Case of United States v. Louisiana Does Not Support Appellees' Case.

Both counsel for the railroad companies in their argument (pages 6-7) and counsel for the Interstate Commerce Commission in their argument (page 5) cite and quote from the *United States v. Louisiana case* above cited (290 U. S. 70, 78 L. ed. 181) as though that case supported their position and as though it held that the testimony of railroad traffic experts "constituted substantial evidence to support the Commission's finding".

It is submitted that that case when properly analyzed and considered does not offer any real support to the appellees' contention in this case.

It did not involve any question as to whether the evidence supporting the order of the Commission was substantial.

The principal question involved in that case was whether the order of the Interstate Commerce Commission was defective as not containing a specific finding as to the reasonableness of **each individual rate**. The Court below had reversed the order of the Interstate Commerce Commission for failure to make a specific finding as to each individual rate, but the Supreme Court reversed the order of the District Court; this Court holding that the statute "does not, in terms, command the Commission to find that **each**

rate prescribed under § 15a is just and reasonable, as prerequisite to a general increase in rates" (78 L. ed. 186) and that the provisions thereof "cannot rightly be construed to require the Commission as a condition of any action by it to find the reasonableness of **each individual rate**" (78 L. ed. 186). (Emphasis added.)

Apparently the District Court had also reversed the order of the Commission upon the theory that the order of the Commission was "unsupported by any finding that the increased rates would produce increased revenues"; this objection, as stated by this Court in its opinion being "rested upon the statement, **separated from its context in the Commission's report** 'we conclude that no positive finding in regard to the revenue outcome of the increases can be justified'" (78 L. ed. 188). (Emphasis added.)

This court thereupon proceeded to show that there were other findings of the Commission expressly holding that the increased rates would produce increases in the revenue (78 L. ed. 188) and hence concluded that "the report **read as a whole**" meets the requirements of the statute.

The language from this case relied upon and quoted by counsel for the Appellees and by the Court below was really used "*arguendo*" by this Court and was in effect merely *dicta*.

There was no question there involved as to the sufficiency of the evidence to constitute substantial evidence. The case did not hold that opinions of traffic experts based upon interstate operations constituted substantial evidence of the results to be expected in intrastate operations.

It is elementary that the language used in any opinion must be construed with relation to the questions and facts involved.

It is also to be noted that this case was decided in 1933, long before the enactment of the Administrative Procedure

Act (1946) which imposes upon the Court the duty to reverse orders of administrative boards which are not supported by substantial evidence and which imposes a greater responsibility upon the courts than had previously been exercised by them in reviewing orders of such commissions (See *Universal Camera Corporation case* hereinafter discussed).

It is earnestly and confidently submitted that the above cited *United States v. Louisiana case* when properly considered and analyzed offers no real support to the appellees in this case.

III. Majority Opinion of District Court Misapprehends Standard Established by Universal Camera Corporation Case.

Counsel for the appellees in their Motions to Affirm also cite and quote from the *Universal Camera Corporation case,* 340 U. S. 474, 95 L. Ed. 456, and its companion case *N. L. R. B. v. Pittsburgh S. S. Co.,* 340 U. S. 480-503, 95 L. Ed. 479, as though such cases support their views in the case at bar.

It is submitted, however, that both of those cases when properly considered and analyzed really support the appellant's position in this case and that the decision of the Court below clearly violates the principles laid down in those cases.

Both those cases involved an ultimate consideration by the Courts of the entire record before the administrative agency and a reversal by the Courts of the agency's order thereon.

The *Universal Camera Corporation case,* after fully discussing the matter, clearly lays down the principle that the reviewing court must, under the Administrative Procedure Act, consider not only the evidence supporting the

order of the commission, but also the contrary evidence, and further that the court must take a greater responsibility for the reasonableness of orders of such commissions hereafter and that a failure so to do constitutes reversible error.

The case involved an order of the National Labor Relations Board which had held the Universal Camera Corporation guilty of unfair labor practices. Upon appeal by the corporation to the Court of Appeals for the Second Circuit, that Court upheld the order of the Board, failing to take into consideration the contrary report of the Examiner. Upon appeal to the United States Supreme Court, the judgment of the Court of Appeals, as well as the order of the Board, was reversed.

This Court, in an opinion by Justice Frankfurter, fully discussed the history of the legislation culminating in the Administrative Procedure Act of 1946 and held that it was the purpose and intention of Congress by the passage of that Act to require the courts to take and assume more responsibility for the reasonableness and fairness of orders by administrative agencies and to reverse such orders unless "upon examination of the whole record" they were found to be supported by substantial evidence. It was particularly pointed out in the Court's opinion that it was the duty of the courts not only to consider the evidence tending to support the order of the agency, but also to consider and weigh the evidence to the contrary; in this respect the principle established being somewhat different from that which had heretofore been applied by some of the courts (See 95 L. Ed. 464).

The foregoing statement is clearly shown by the following quotations, *passim*, from the opinion of the Court:

> "So far as the history of this movement for enlarged review reveals, the phrase 'upon the whole record' makes its first appearance in this recommendation

of the minority of the Attorney General's Committee. This evidence of the close relationship between the phrase and the criticism out of which it arose is important, for the substance of this formula for judicial review found its way into the statute books when Congress with unquestioning—we might say even uncritical—unanimity enacted the Administrative Procedure Act. * * *

The Committee reports of both houses refer to the practice of agencies to rely upon 'suspicion, surmise, implications, or plainly incredible evidence', and indicate that courts are to exact higher standards **'in the exercise of their independent** judgment' and on consideration of **'the whole record'**." * * * (95 L. Ed. 464-465.) (Emphasis added.)

"From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof." * * *

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the

movement which eventuated in that enactment. * * * (95 L. ed. 467.)

"The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized." * * * (95 L. ed. 468.)

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function." * * * (95 L. ed. 468.)

"The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a **fair estimate of the worth of the testimony of witnesses** or its informed judgment on matters within its special competence or both." * * * (95 L. ed. 468-469.)

The Court concluded this portion of its opinion by saying that the Court "will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied" (95 L. Ed. 469). The Court then proceeded to show that the Court of Appeals had misapplied the proper standard by treating the special examiner's findings as being "as unassailable as a master's" and by failing to give proper weight to the examiner's report and hence this Court reversed the order of the Court of Appeals and also the order of the National Labor Relations Board.

Likewise, in the companion case of the *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U. S. 496-503, 95 L. Ed. 479, the Supreme Court affirmed a judgment of the United States Court of Appeals for the Sixth Circuit reversing an order of the Board for failure of the evidence to support the Board's order.

This Court expressly commented upon the fact that its final judgment was based upon "consideration of the opinion below in the light of a careful reading of the entire record" (95 L. Ed. 482) and further that the Court below, whose judgment it was affirming, "painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence" (95 L. Ed. 482).

We submit that it is clearly demonstrable that the principles laid down in the foregoing cases have been violated by the decision of the Court below in this case.

It is clear, it is submitted, that Judge Parker in writing the majority opinion of the Court below misapprehended the test laid down by the Administrative Procedure Act and by the *Universal Camera Corporation case* above cited in that he failed to give any proper consideration to the contrary evidence of the shippers and to the contrary findings by the South Carolina Public Service Commission.

This is apparent from the fact that Judge Parker in his opinion only quotes from and relies upon the opinions of the railroad companies' witnesses and finally concludes by saying, "Whether experience with interstate rates is a dependable guide in juding the effect of a corresponding increase in intrastate rates is a matter of expert judgment **as to which the opinion of the railroad traffic experts is certainly substantial evidence of real value,** as their railroads will bear the loss if the increase of rates which they propose results in a decrease of revenue". (Emphasis added.)

In other words, he says in effect that the opinion of the railroad traffic experts is "**certainly substantial evi-**

dence of real value" without indicating that in valuing such opinions it is necessary to consider the contrary evidence, as is required in the *Universal Camera Corporation case.* Moreover, it is apparent from the reading of his opinion that he did not give any proper consideration, or any consideration at all, to the contrary evidence of the shippers or to the findings of the South Carolina Public Service Commission, which according to the decision in the *Mississippi case,* affirmed by this Court, "detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner" * * *.

It is manifest that if the question at issue is to be determined solely by the opinion of the railroad traffic experts based upon the results in interstate commerce and if such evidence is to be considered "certainly substantial evidence of real value" then, of course, there is no purpose or sense in considering the contrary evidence of the shippers and the contrary findings of the South Carolina Public Service Commission. Judge Parker's opinion amounts to saying in effect that the question is to be determined wholly on the evidence offered by the railroad companies. But this is directly in the face of the decision in the *Universal Camera Corporation case* that the Court must take into consideration the evidence leading to a contrary conclusion, and this is what was done in the *Mississippi case* which correctly followed the principle laid down in the *Universal Camera Corporation case.*

It is therefore clear, it is submitted, that the opinion of Judge Parker violates and misapprehends and misapplies the principle laid down in the *Universal Camera Corporation case.*

It is also noteworthy that all the cases relied upon and quoted from by Judge Parker in his opinion as sustaining his conclusion (*Interstate Commerce Commission v. Union*

Pacific R. Co., 222 U. S. 541, 547; *Florida v. United States*, 292 U. S. 1, 12; *Mississippi Valley Barge Co. v. United States*, 292 U. S. 282, 286; *Swayne & Hoyt Ltd. v. United States*, 300 U. S. 297, 304) were decided long before the enactment of the Administrative Procedure Act and before the decision in the *Universal Camera Corporation case*, which decision largely discredits the previous decisions relied upon by Judge Parker.

IV. The Mississippi Case is Controlling and Requires Reversal.

Both counsel for the Government and counsel for the railroad companies in their Motions to Affirm seek to distinguish the case at bar from the *Mississippi case* cited and relied upon by us (124 Fed. Sup. 809, affirmed by the United States Supreme Court, 99 L. Ed. 502).

They both, however, apparently overlook the fact that the opinion in that case was affirmed by the United States Supreme Court.

Counsel for the Government in their argument in this Court (page 6) claim there is no conflict "for the facts and the evidence were not the same in the two cases".

They do not, however, in their argument point out any essential differences in the facts and the evidence. We submit that the facts in the two cases were essentially the same, as shown in our Jurisdictional Statement.

This argument, moreover, represents a shift of position on the part of the counsel for the Interstate Commerce Commission and for the Justice Department. In their written argument filed in the District Court in this case, counsel for those departments expressly stated that "The Commission and the United States **have not accepted as correct statements of the law all that was said in the majority opinion** in the *Mississippi case*, including several state-

ments indicating that findings of fact made by the Mississippi Public Service Commission were entitled to greater weight than the contrary findings made by the Interstate Commerce Commission. (Emphasis added.) In this statement by counsel there was no contention that the facts or evidence in the two cases were essentially different. Hence, it follows that the foregoing statement of counsel for the Government in their argument in the District Court must be interpreted as meaning that **they do not accept as correct statements of the law what was said by the court in the *Mississippi case* as applied to the facts of that case,** which were essentially the same as the facts in the case at bar.

For our part, we cannot believe that the United States Supreme Court could have affirmed the *Mississippi case* without meaning to affirm and approve the ruling of the District Court contained in the following language:

> "The Court in reviewing an order of the Interstate Commerce Commission has the duty to study the entire record and it is the function of the Court to determine from the whole record whether or not there was substantial evidence before the Commission upon which its order could be based. If there were no substantial evidence then it is the duty of the Court to set aside such order and enjoin its enforcement. Congress in enacting in 1946 the Administrative Procedure Act, 5 U. S. C. A. § 1001 *et seq.*, made it mandatory that the reviewing court should set aside an order that was unsupported by substantial evidence and that it should review the whole record in making the determination. The Supreme Court of the United States in *Universal Camera Corporation v. N. L. R. B.*, 340 U. S. 474,, 71 S. Ct. 456, 95 L. Ed. 456, held that in determining what is substantial evidence that the Court must take into consideration whatever in the record fairly detracts from its weight. Under the decision in that case it is the duty of the reviewing court when it cannot conscientiously find that the evidence

supporting the order of the Commission is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view, to set aside the order of the Commission.

Substantial evidence is a legal term and presents to the court for adjudication a question of law." * * * (124 Fed. Sup. 814.)

"Substantial evidence is a term that cannot be defined definitely, but whether the evidence in a particular case amounts to substantiality must be determined from the facts of each case as it arises."

The order in this case when viewed in the light of the entire record and all of the circumstances leading up to its passage and giving weight to all things that detract from the sufficiency of the evidence is not supported by substantial evidence and must be set aside and its enforcement enjoined." * * * (124 Fed. Sup. 815.)

"Different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates. The findings of a state commission which is familiar with such conditions in the state, with the location of competing highways and other forms of carriers, when its opinion differs from the Interstate Commerce Commission's findings detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner. * * * * *

The testimony of the various witnesses who are shippers of many of the products involved herein demonstrates that if the rates are permitted to stand as fixed by the Interstate Commerce Commission, the income of the railroads will be reduced rather than increased. Many of these are shippers themselves and testified positively and unequivocally that it would be economy for them to use their own individual trucks or private carriers by truck, who are unregulated so far as rates are concerned in Mississippi." * * * * (124 Fed. Sup. 815-816.)

"The testimony of the various witnesses and experts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testimony has been fully weighed in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantially sufficient to uphold the order here under attack and the findings that were made by the Interstate Commerce Commission." * * * (124 Fed. Sup. 816.)

"On all of the commodities involved in the controversy the competition by carriers is keen and would come not only from regulated trucks for hire but from unregulated trucks and from trucks owned and operated by the shippers themselves. This is clearly shown by the record and by positive testimony and overwhelmingly overthrows and overrides the opinions of the experts." * * * * (124 Fed. Sup. 817.)

The foregoing language from the *Mississippi case* is as apt and apposite to the facts in the case at bar as though expressly written for this case. It certainly holds and establishes as a matter of law that results in interstate operations, if in the face of contrary evidence of intrastate shippers and contrary findings by state commissions, do not constitute substantial evidence of the results to be expected from intrastate operations.

Counsel for the Government in their argument (pp. 6-7) and also counsel for the railroads in their argument (pp. 14-15) claim in effect that this Court should sustain the judgment below because this Court affirmed the judgment in the case of *Louisiana Public Service Commission v. United States*, 125 F. Supp. 180 (E. D. La.), *affirmed per curiam* (November 1954) 348 U. S. 885; counsel for the Government claiming that the cases involved "somewhat similar evidence".

It is submitted, however, that there is no showing whatsoever in the official report of that case (125 F. Supp.

pp. 180-183) or in the argument of counsel for appellees that the cases involved really similar evidence.

Moreover, and more important, there was no indication of the Court's opinion in that case, as there was in the opinion of the majority of the Court in the case at bar, that the Court had confined its consideration to the evidence offered by the railroads and had concluded that the ultimate question "is a matter of expert judgment as to which the opinion of the railroad traffic experts **is certainly substantial evidence of real value**". It is thus plain that while the Court in the *Louisiana Public Service Commission case* apparently properly considered the whole record and applied the proper standards, the majority of the Court in the case at bar misapprehended the standard and decided the case wholly upon the evidence offered by the railroad companies.

In this respect the two cases are vitally and essentially different.

Moreover, it is to be noted that the decisions in the *Mississippi case,* both by the District Court and this honorable Court, were at a later date than the decision in the *Louisiana Public Service Commission case,* and hence if there be any conflict between the two, the decision in the *Louisiana Public Service Commission case* must be considered to have been modified by the decision in the *Mississippi case* which was affirmed by this honorable Court on April 15, 1955.

It is earnestly and respectfully submitted that logically it is impossible to have affirmed the judgment in the *Mississippi case* without reversing the judgment in the case at bar.

V. Summary and Conclusion.

Finally it is submitted that both on authority and on reason and logic, the decision of the Court below must be reversed.

The *Mississippi case,* following the *Universal Camera Corporation case,* expressly holds that "substantial evidence is a legal term and presents to the court for judication a question of law" (Fed. Sup. 124, page 814) and further that "different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates". The affirmance of the said judgment by the Supreme Court, it is submitted, amounts to the establishment by this Court as a matter of law that the results obtained from interstate operations cannot be considered as substantial evidence of the results to be expected from intrastate rates.

But on this very point, Judge Parker's opinion in the Court below expressly holds that whether experience with interstate rates is a dependable guide in judging the effect of a corresponding increase in intrastate rates is a matter of expert judgment as to which the opinion of the railroad traffic experts is certainly substantial evidence of real value. Thus Judge Parker's opinion makes the conclusion wholly dependent upon the opinion of the railroad traffic experts. This judgment goes squarely in the face of the decision in the *Mississippi case* as affirmed by this Court.

It seems to us too clear for argument that Judge Parker in his opinion has also disregarded the contrary evidence and has misapprehended and misapplied the standards laid down in the *Universal Camera Corporation case* and in the *Mississippi case.*

The same result follows by application of the principles of logic to the decision of the Court below.

The syllogistic reasoning underlying the decision of the Court below and the opinion of the traffic experts upon which that decision was based, is as follows:

The evidence shows that in interstate operations increased rates have produced increased revenues; hence it follows that in intrastate operations in the state of South Carolina increased rates will produce increased revenues.

However, when it is realized that the evidence shows that conditions in the different states in intrastate commerce are essentially different from the conditions in interstate commerce, it is obvious that the result as stated is unsound.

It is as though one should argue that because a race horse can run a mile on a race course in less than two minutes, the race horse can also run a mile across country, across ditches and fences and woods, in less than two minutes. The fallacy of such reasoning is too apparent for argument.

In the case at bar there are at least three factors which destroy the validity of the reasoning and argument underlying the decision of the Court below, such factors being:

1. The uniform testimony of the shippers, who were in position to control the shipment of the commodities in question, to the effect that if the rates were increased as sought such shippers would divert their traffic to trucks and that the railroad's revenue would be decreased rather than increased.

2. The finding by the South Carolina Public Service Commission, who are familiar with local conditions in the State of South Carolina, with the roads and the truck competition, that the effect of the increase in rates would be to decrease rather than increase the freight revenue; and:

3. The fact that the railroad companies themselves, with the approval of the Interstate Commerce Commission,

after the taking of evidence in this case, found and concluded that notwithstanding the evidence as to the increase in revenue in interstate operations in cement and cotton, cement being the largest single item concerned, it was necessary to withdraw the request for the increase in cement and cotton rates in order to continue to meet the truck competition.

It is apparent, it is submitted, that the Court below did not give any proper consideration to these factors in reaching its conclusions as to the substantiality of the evidence, but on the contrary based its decision wholly on the opinion of the railroad company experts. Hence the Court below misapprehended and misapplied the standard and its decision should be reversed.

By way of postcript, and in reply to the suggestion contained in the argument of appellees railroads (page 11) to the effect that we are asking the Court to review "the entire record consisting of 889 pages and 51 exhibits", and in reply to a similar suggestion by counsel for the Government in their argument (page 6), we may say that at the conclusion of the argument in the District Court, that Court invited counsel for the appellees to submit the testimony which they considered pertinent.

In response to this invitation, counsel for the United States and for the Interstate Commerce Commission submitted a mimeographed statement containing "I Evidence in support of increases" (pp. 6-17), 12 pages, and "II Evidence against increases" (pp. 18-29), 12 pages—total, 24 pages. Counsel for the railroad companies submitted a like mimeographed statement entitled "The Evidence Upon Which the Defendant Railroads Rely" (pp. 2-15)—14 pages. Counsel for the Atlantic Coast Line Railroad Company submitted a special statement entitled "Testimony of Witnesses Showing That Increased Rates Would Substan-

tially Increase Respondents' Revenues on Pulpwood", said statement consisting of 12 mimeographed sheets.

It is therefore apparent that in the determination of this case there could be no real necessity for this Court to review the entire record. The evidence on the disputed issue is in fact undisputed and is fairly and fully set forth in our Jurisdictional Statement.

In the face of the foregoing we do not see how counsel for the railroads can fairly contend that it is necessary for this Court to review an entire record consisting of 889 pages.

Moreover, it seems to us, as we have already shown, that Judge Parker in his opinion has misapprehended the standard and the function of the courts and that the judgment on its face should be reversed, without any extensive examination of any evidence.

Respectfully submitted,

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